

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**



74-2168

REPLY BRIEF FOR AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 74-2168

THE VERMONT NATURAL RESOURCES COUNCIL, ET AL.,

Plaintiffs-Appellants

v.

CLAUDE S. BRINEGAR, ET AL.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT



September 18, 1974

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In this reply brief, amicus curiae Natural Resources Defense Council, Inc. (NRDC) responds only to the new contention which the federal appellees raise for the first time in this case in support of their position that the District Court lacked jurisdiction of appellants' claim under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1344.

In this new argument, the federal appellees assert that appellants' claim under Section 404 of FWPCA cannot be raised under Section 505 of FWPCA because Section 505 does not authorize citizen suits to enforce FWPCA's requirement that all point source dischargers have permits. Brief for the Federal Defendant-Appellees, at 25-27 [hereinafter "Fed. Br."]. As amicus demonstrates here, however, the federal appellees are simply wrong because Section 505 applies expressly to violations of the Act involving discharging dredge and fill materials without a permit.<sup>1</sup>

In supporting their contention that "Section 505 does not authorize this suit," federal appellees first quote Section 505 "insofar as is relevant." Fed. Br., at 25. After quoting only subsections (a), (b) and (c) of Section 505, federal appellees state:

"As is plain from the words of the Act, this 'citizens' suit' provision applies only to situations where there is an alleged violation of an effluent standard limitation [sic] or an order of the administrator or State with respect to such standard. Here there is no such alleged

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<sup>1/</sup> It should be noted that this argument is relevant to resolution of this case only if this Court finds that Section 505 is the exclusive remedy for violation of Section 404, a position amicus has demonstrated is contrary to the explicit provisions of the Act, Section 505(e), 33 U.S.C. § 1365(c), and to judicial decisions under the FWPCA. Brief for Amicus Curiae, at 11-15.



violation for the simple reason that there is no effluent standard or order to have been violated." Fed. Br. 26-27.

What federal defendants conveniently fail to call to the Court's attention is subsection (f) of Section 505 which defines "effluent standard or limitation" as used in Section 505:

"(f) For purposes of this section, the term 'effluent standard or limitation under this Act' means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act)." (Emphasis added.)

In short, citizen suits can be brought under Section 505 to correct "an unlawful act under subsection (a) of section 301." As amicus has demonstrated at length, discharging pollutants without a FWPCA permit is an unlawful act under Section 301(a). Brief for Amicus Curiae, at 19-22. Since discharging pollutants -- in this case "dredged or fill material" -- without a FWPCA permit is precisely what appellees propose to do in this case, a citizen suit action to challenge this violation of Section 301(a) can be brought under Section 505.<sup>2</sup>

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<sup>2/</sup> Both Senate and House Reports indicate that Congress had discharging without a permit in mind when it referred in Section 505(f)(1) to "an unlawful act under subsection (a) of section 301." See Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973), at 821 (House Report), 1499 (Senate Report). Moreover, both the House Report and the Conference Report state that the requirement of having a permit can be enforced under Section 309 of FWPCA, which contains language similar to that in Section 505. Id., at 325 (Conference Report), 801 (House Report).

Respectfully submitted,

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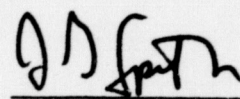
CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the Reply Brief for Amicus Curiae in the case of The Vermont Natural Resources Council, et al. v. Claude S. Brinegar, et al., No. 74-2168, to be delivered to the persons noted below in the manner indicated:

1. By hand delivery to Edmund B. Clark, Esq., Land and Natural Resources Division, Room 2339, U.S. Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, attorney for Appellee;

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